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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW ALEXANDER SMITH,

Defendant.

Case No.: 08CR2716-H

MOTIONS TO:

- 1) COMPEL DISCOVERY;
- 2) SUPPRESS STATEMENTS; AND
- 3) GRANT LEAVE TO FILE FURTHER MOTIONS.

Date: September 29, 2008

Time: 2:00 p.m.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND
LUELLA MENDOZA CALDITO, ASSISTANT UNITED STATES
ATTORNEY:

PLEASE TAKE NOTICE that on September 29, 2008 at 2:00 p.m. or as soon thereafter as
counsel may be heard, the defendant, Matthew Alexander Smtih, by and through his counsel,
Shaun Khojayan will ask the Court to enter an order granting the following motions.

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I.

STATEMENT OF FACTS

The following statement of facts has been complied from information provided in the discovery from the government. Mr. Smith does not adopt these facts as his own, and reserves the right to take a contrary position at motions or trial.

Defendant Matthew Alexander Smith has been charged in an indictment charging Bringing in Illegal Aliens for Financial Gain, 8 U.S.C. §1324 (a)(2)(B)(ii), Aiding and Abetting, 18 U.S.C. §2, Bringing in Illegal Aliens without Presentation, 8 U.S.C. §1324 (a)(2)(B) (iii), Misuse of Passport, 18 U.S.C. §1544 and Use of a False Means of Identification, 18 U.S.C. §1028 (a)(7) and (b)(1)(A)(I). The government's discovery alleges Mr. Smith made statements in response to government questioning.

III.

MOTION TO COMPEL DISCOVERY

Mr. Smith moves for the production by the government of the following discovery and for the preservation of evidence. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any government agency. *See generally Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989).

(1) The Defendant's Statements. The government must disclose to the defendant all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant which the government intends to offer in evidence at trial; any response by the defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial and any written summaries of the defendant's oral statements contained in the handwritten notes of the government agent; any response to any Miranda warnings which may have been given to the defendant; as well as any other statements by the defendant. Fed. R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that

1 the Government must reveal all the defendant's statements, whether oral or written, regardless of
2 whether the government intends to make any use of those statements.

3 (2) Arrest Reports, Notes and Dispatch Tapes. The defendant also specifically requests the
4 government to turn over all arrest reports, notes, dispatch or any other tapes, and TECS records that
5 relate to the circumstances surrounding his arrest or any questioning. This request includes, but is
6 not limited to, any rough notes, records, reports, transcripts or other documents in which statements
7 of the defendant or any other discoverable material is contained. Such material is discoverable under
8 Fed. R. Crim. P. 16(a)(1)(A) and *Brady v. Maryland*, 373 U.S. 83 (1963). The government must
9 produce arrest reports, investigator's notes, memos from arresting Agents, dispatch and other tapes,
10 sworn statements, and prosecution reports pertaining to the defendant and his arrest. *See* Fed. R.
11 Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I).

12 (3) *Brady* Material. The defendant requests all documents, statements, agents' reports, and
13 tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility
14 of the government's case. Under *Brady*, impeachment as well as exculpatory evidence falls within
15 the definition of evidence favorable to the accused. *United States v. Bagley*, 473 U.S. 667 (1985);
16 *United States v. Agurs*, 427 U.S. 97 (1976).

17 (4) Any Information That May Result in a Lower Sentence Under The Guidelines. The
18 government must produce this information under *Brady v. Maryland*, 373 U.S. 83 (1963). This
19 request includes any cooperation or attempted cooperation by the defendant as well as any
20 information that could affect any base offense level or specific offense characteristic under Chapter
21 Two of the Guidelines. The defendant also requests any information relevant to a Chapter Three
22 adjustment, a determination of the defendant's criminal history, and information relevant to any other
23 application of the Guidelines.

24 (5) The Defendant's Prior Record. The defendant requests disclosure of his prior record.
25 Fed. R. Crim. P. 16(a)(1)(B).

26 (6) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar
27 acts under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R.
28 Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in

1 advance of trial . . . of the general nature" of any evidence the government proposes to introduce
2 under Fed. R. Evid. 404(b) at trial. The defendant requests such notice sufficiently in advance of
3 trial in order to give the defense time to adequately investigate and prepare for trial.

4 (7) Evidence Seized. The defendant requests production of evidence seized as a result of
5 any search, either warrantless or with a warrant. Fed. R. Crim. P. 16(a)(1)(C).

6 (8) Request for Preservation of Evidence. The defendant specifically requests the
7 preservation of all dispatch tapes or any other physical evidence that may be destroyed, lost, or
8 otherwise put out of the possession, custody, or care of the government and which relate to the arrest
9 or the events leading to the arrest in this case. This request includes, but is not limited to, the results
10 of any fingerprint analysis, the defendant's personal effects, the vehicle, and any evidence seized
11 from the defendant or any third party.

12 (9) Tangible Objects. The defendant requests the opportunity to inspect and copy as well as
13 test, if necessary, all other documents and tangible objects, including photographs, books, papers,
14 documents, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the
15 defense or intended for use in the government's case in chief or were obtained from or belong to the
16 defendant. Fed. R. Crim. P. 16(a)(1)(C).

17 (10) Expert Witnesses. The defendant requests the name, qualifications, and a written
18 summary of the testimony of any person that the government intends to call as an expert witness
19 during its case in chief. Fed. R. Crim. P. 16(a)(1)(E).

20 (11) Evidence of Bias or Motive to Lie. The defendant requests any evidence that any
21 prospective government witness is biased or prejudiced against the defendant, or has a motive to
22 falsify or distort his or his testimony.

23 (12) Impeachment Evidence. The defendant requests any evidence that any prospective
24 government witness has engaged in any criminal act whether or not resulting in a conviction and
25 whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609
26 and 613; *Brady v. Maryland*. In addition, Mr. Macias-Encinas requests that the Assistant United
27 States Attorney assigned to this case oversee a review of all personnel files of each agent involved in
28 the present case for impeachment material. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *United States*

1 *v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); but see *United States v. Herring*, 83 F.3d 1120 (9th Cir.
2 1996).

3 (13) Evidence of Criminal Investigation of Any Government Witness. The defendant
4 requests any evidence that any prospective witness is under investigation by federal, state or local
5 authorities for any criminal conduct.

6 (14) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling.
7 The defense requests any evidence, including any medical or psychiatric report or evaluation, that
8 tends to show that any prospective witness' ability to perceive, remember, communicate, or tell the
9 truth is impaired, and any evidence that a witness has ever used narcotics or other controlled
10 substance, or has ever been an alcoholic.

11 (15) Witness Addresses. The defendant requests the name and last known address of each
12 prospective government witness. The defendant also requests the name and last known address of
13 every witness to the crime or crimes charged (or any of the overt acts committed in furtherance
14 thereof) who will not be called as a government witness.

15 (16) Name of Witnesses Favorable to the Defendant. The defendant requests the name of
16 any witness who made an arguably favorable statement concerning the defendant or who could not
17 identify him or who was unsure of his identity, or participation in the crime charged.

18 (17) Statements Relevant to the Defense. The defendant requests disclosure of any
19 statement relevant to any possible defense or contention that he might assert.

20 (18) Jencks Act Material. The defendant requests production in advance of trial of all
21 material, including dispatch tapes, which the government must produce pursuant to the Jencks Act,
22 18 U.S.C. § 3500. Advance production will avoid the possibility of delay at the request of defendant
23 to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute an
24 accurate account of the witness' interview is sufficient for the report or notes to qualify as a
25 statement under section 3500(e)(1). *Campbell v. United States*, 373 U.S. 487, 490-92 (1963). In
26 *United States v. Boshell*, 952 F.2d 1101 (9th Cir. 1991) the Ninth Circuit held that when an agent
27 goes over interview notes with the subject of the interview the notes are then subject to the Jencks
28 Act.

1 (19) *Giglio* Information. Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), the
2 defendant requests all statements and/or promises, express or implied, made to any government
3 witnesses, in exchange for their testimony in this case, and all other information which could
4 arguably be used for the impeachment of any government witnesses.

5 (20) Agreements Between the Government and Witnesses. The defendant requests
6 discovery regarding any express or implicit promise, understanding, offer of immunity, of past,
7 present, or future compensation, or any other kind of agreement or understanding, including any
8 implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between
9 any prospective government witness and the government (federal, state and/or local). This request
10 also includes any discussion with a potential witness about or advice concerning any contemplated
11 prosecution, or any possible plea bargain, even if no bargain was made, or the advice not followed.

12 (21) Informants and Cooperating Witnesses. The defendant requests disclosure of the names
13 and addresses of all informants or cooperating witnesses used or to be used in this case, and in
14 particular, disclosure of any informant who was a percipient witness in this case or otherwise
15 participated in the crime charged against Mr. Macias-Encinas. The government must disclose the
16 informant's identity and location, as well as disclose the existence of any other percipient witness
17 unknown or unknowable to the defense. *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). The
18 government must disclose any information derived from informants which exculpates or tends to
19 exculpate the defendant.

20 (22) Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of any
21 information indicating bias on the part of any informant or cooperating witness. *Giglio v. United*
22 *States*, 405 U.S. 150 (1972). Such information would include what, if any, inducements, favors,
23 payments or threats were made to the witness to secure cooperation with the authorities.

24 (23) Residual Request. Mr. Macias-Encinas intends by this discovery motion to invoke his
25 rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and
26 the Constitution and laws of the United States. Mr. Macias-Encinas requests that the government
27 provide him and his attorney with the above requested material sufficiently in advance of trial to
28 avoid unnecessary delay prior to cross-examination.

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2 **III.**

3 **MOTION TO SUPPRESS STATEMENTS**

4 The Supreme Court has determined that a person must be advised of his Miranda rights if,
5 and when, he is "subjected to restraints comparable to those of a formal arrest." *Berkemer v.*
6 *McCarty*, 468 U.S. 420 (1984). "[A] host of factors must be considered in order to determine
7 whether the suspect's freedom of action is curtailed to a degree associated with formal arrest."¹⁰
8 *Berkemer*, 468 U.S. 420. Among the factors to be considered are whether the suspect was
9 questioned in familiar or at least neutral surroundings, the number of law enforcement Agents
10 present at the scene, the degree of physical restraint placed upon the suspect, and the duration and
11 character of the interrogation. *Streifel*, 781 F.2d at 961 n.13 (quoting 1 W. Lafave & J. Israel,
12 Criminal Procedure § 6.6, at 494-99 (1984). Blocking a vehicle's ability to exit is also relevant to the
13 inquiry. *Streifel*, 781 F.2d at 962 n.15.

14 In the instant case, the detention of Mr. Smith had all the hallmarks of an arrest. Prior to any
15 questioning, Mr. Smith should have been advised of his Miranda rights, and as a result of the Agents'
16 failure to do so, any statements or evidence obtained thereafter must be suppressed.

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18 **IV.**

19 **MOTION FOR LEAVE TO FILE FURTHER MOTIONS**

20 Defense counsel has received limited discovery in this case. As information comes to
21 light, due to the government providing additional discovery in response to these motions or an
22 order of this Court, the defense may find it necessary to file further motions. It is, therefore,
23 requested that defense counsel be allowed the opportunity to file further motions based upon
24 information gained through the discovery process.

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1 V.

2 **CONCLUSION**

3 For the foregoing reasons, Mr. Smith respectfully requests that this Court grant these
4 motions.

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7 Dated:9/8/08

Respectfully submitted,

LAW OFFICES OF SHAUN KHOJAYAN
& ASSOCIATES, P.L.C.

9 s/ Shaun Khojayan
10 SHAUN KHOJAYAN
11 Attorney for Defendant Smith
Email: shaun@khojayan.com

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1 **CERTIFICATE OF SERVICE**

2 Counsel for Defendant certifies that the foregoing pleading is true and accurate and that a
3 copy of the foregoing document has been served this day upon:

4 **Electronic Mail Notice List**

5 The following are those who are currently on the list to receive e-mail notices for this case.

6 **Shaun Khojayan**
7 shaun@khojayan.com hashen@khojayan.com

8 **Luella Mendoza Caldito**
9 Luella.Caldito@usdoj.gov

10 **Manual Notice List**

11 The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case
12 (who therefore require manual noticing). You may wish to use your mouse to select and copy
13 this list into your word processing program in order to create notices or labels for these
14 recipients.

15 • (No manual recipients)

16
17 I declare under penalty of perjury that the foregoing is true and correct.
18

19 Dated: September 8, 2008

20 s/ Shaun Khojayan
21 Shaun Khojayan, Declarant

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